89-394

NO. _____

In The Supreme Court Of The United States

October Term, 1989

Walker Operating Corporation; Stowers Oil & Gas Company; Vanderburg Production, Inc.; Security Petroleum Drilling, Inc.; Vanderburg Exploration, Inc.; Dahalo Lease Corporation; Kaari Oil Company, Inc.; Magnet Oil, Inc.; Tumbleweed Production; Dennis Mills Enterprises; Panhandle Energy Corporation; Energy-Agri Products, Inc.; Bink, Inc.; Aspen Petroleum, Inc.; Bob Wallace Oil, Inc.; Sharon Lease Oil Company; Judy Oil Company; 3W Oil, Inc.; Wy-Vel Corporation; Ezekiel Energy; Almac Oil Company; The Harlow Corporation; Raven Energy, Inc.; Prairie Oil Company; Omega Energy; Tri-Ex Oil & Gas, Inc.; Komanche Oil & Gas; Kim Petroleum Co., Inc.; Lear Oil and Gas, Inc.; Panstar Oil & Gas, Inc.; Caprock Engineers, Inc.; Caddo Production; A&R Production; and Zena-B Oil & Gas, Inc.; **Petitioners**

v.

Federal Energy Regulatory Commission, **Respondent**

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari — Civil Case

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*APPLICATION FOR ADMISSION
TO BAR OF THIS COURT PENDING

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Tenth Circuit Court of Appeals erred in upholding Federal Energy Regulatory Commission (FERC) Opinion No. 239 which improperly regulates "production or gathering" which is reserved for state regulation pursuant to Section 1(b) of the Natural Gas Act (NGA)?

B. Whether the Tenth Circuit Court of Appeals erred in failing to hold that the FERC acted beyond its competence and abused its discretion by deciding new or unsettled issues of Texas law without deferring to the Texas Railroad Commission and Texas courts?

C. Whether the Tenth Circuit Court of Appeals erred in failing to hold that Opinion No. 239 impermissibly circumvented Sections 2(8), 103 and 503(d) of the Natural Gas Policy Act of 1978 (NGPA) by retroactively changing and withdrawing ceiling price determinations which were final and binding?

D. Whether the Tenth Circuit Court of Appeals erred in failing to hold that Opinion No. 239 and the administrative hearing on which it was based violated basic procedural due process by giving inadequate notice of the nature of the state and federal law violations alleged against these Petitioners and by denying them an adequate opportunity to present evidence on such allegations?

LIST OF PARTIES

The following were parties to the proceeding in the Tenth Circuit Court of Appeals:

Petitioners below:

Walker Operating Corporation*; Stowers Oil & Gas Company; Tumbleweed Production; Dennis Mills Enterprises; Panhandle Energy Corporation; Bink, Inc.; Sharon Lease Oil Company; Judy Oil Company; 3W Oil, Inc.; Wy-Vel Corporation; Almac Oil Company; Prairie Oil Company; Omega Energy; Komanche Oil & Gas; Kim Petroleum Co., Inc.; Panstar Oil & Gas, Inc.; Lucky Bird Petroleum, Inc.; J. B. Watkins; Vanderburg Production, Inc.; Security Petroleum Drilling, Inc.; Vanderburg Exploration, Inc.; Dahalo Lease Corporation; Kaari Oil Company, Inc.; Magnet Oil, Inc.; Energy-Agri Products, Inc.; Aspen Petroleum, Inc.; Bob Wallace Oil, Inc.; Ezekiel Energy; The Harlow Corporation; Raven Energy, Inc.; Tri-Ex Oil & Gas, Inc.; Lear Oil and Gas, Inc.; Caprock Engineers, Inc.; Caddo Production; A&R Production; Zena-B Oil & Gas, Inc.; Cabot Pipeline Corporation; Railroad Commission of Texas; and State of Texas

Respondent below:

Federal Energy Regulatory Commission

Intervenors below:

Phillips Petroleum Company; Northern States Power Companies; Lake Superior District Power Company; Natural Gas Pipeline Company of America; Iowa Public Service Company; Anadarko Production Company; Pan Eastern Exploration Company; Inter-City Gas; The Energy Issues Intervention Office of the Minnesota Department of Public Service; Northern Natural Gas Company, Division of Enron Corp.; Colorado Interstate Gas Company; Dorchester Master Limited Partnership; Mobil Producing Texas & New Mexico Inc.; Williams Natural Gas Company; Texaco Producing Inc.; and Conoco, Inc.

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*Walker Operating Corporation is a wholly owned subisidary of The Walker Corporation. No other corporate Petitioner is related to any other corporation.

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JURISDICTION

The judgment of the Court of Appeals affirming FERC's Order was entered on April 28, 1989. No motion for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1(b) and 7(b) of the Natural Gas Act, 15 U.S.C. §717, et seq., as well as Sections 2(8), 103, 109, 121, 501, 503, 504, and 601 of the Natural Gas Policy Act, 15 U.S.C. §3301, et seq., are involved in this cause. Various provisions contained in the Texas Natural Resources Code, §§81.001, et seq., §§85.001, et seq., and §§86.001, et seq., also are involved in this cause. Copies of each of the foregoing are appended to the Petition for Writ of Certiorari filed herein by the Attorney General of Texas on behalf of the Texas Railroad Commission and The State of Texas. That appendix (and each of its exhibits) is respectfully incorporated herein and made a part hereof.

STATEMENT OF THE CASE

A statement of the case containing the facts material to the consideration of the questions presented has been set forth in the Petition for Writ of Certiorari filed by the Attorney General of Texas on behalf of the Texas Railroad Commission and The State of Texas. That statement is respectfully incorporated herein and made a part hereof as though fully restated.

BASIS FOR FEDERAL JURISDICTION IN THE COURT (AGENCY) OF FIRST INSTANCE

As is more fully stated elsewhere herein, it is the position of these Petitioners that there is and was no basis for the FERC to exercise federal jurisdiction over the Petitioners in this instance.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The reasons relied on for allowance of the writ are amplified in the Petition for Writ of Certiorari filed by the Attorney General of Texas on behalf of the Texas Railroad Commission and The State of Texas. Those reasons are respectfully incorporated herein and made a part hereof as though fully restated.

SUMMARY OF ARGUMENT

The Petitioners respectfully submit that Opinion No. 239 and the entire proceeding on which it was based constitute an unprecedented direct assault by the FERC on state regulation of the production and gathering of oil and gas, in contravention of the NGA and the NGPA. The immediate effect

of Opinion No. 239 is to reopen and reverse well classifications of the Railroad Commission which federal law reserves to the states to perform. The larger impact of Opinion No. 239 is to establish a federal interpretation of several critical issues of state oil and gas law, thereby impeding the State of Texas from effective control over matters of intensely local concern.

Section 1(b) of the NGA reserves to the states jurisdiction over the "production or gathering" of natural gas. Opinion No. 239 impermissibly intrudes the FERC into state regulation of "production" activities in violation of Section 1(b). Even if the FERC may address such state law issues in the course of enforcing the NGA, it should have deferred to Texas authorities to resolve unsettled issues of state law.

Opinion No. 239 also unlawfully circumvents Sections 2(8), 103, and 503 of the NGPA by retroactively reopening and vacating ceiling price determinations which were final and binding. A reopening can occur only pursuant to the specific provisions of Section 503, which the FERC has admittedly not followed in this case. Unless and until the Section 103 determinations are reopened and vacated in accordance with Section 503, the FERC has no NGA jurisdiction over the Section 103 wells pursuant to Section 601 of the NGPA.

Finally, the administrative proceeding below was flawed by serious procedural errors amounting to a denial of these Petitioners' right to due process because it precluded them from introducing affirmative evidence addressing key elements of the violations of law found in Opinion No. 239.

ARGUMENT

A. Opinion No. 239 Exceeds the FERC's Authority under Section 1(b) of the Natural Gas Act.

Arguments in support of Petitioners' allegations in this regard have been set forth in paragraph A of the "Argument" section of the Petition for Writ of Certiorari filed by the Attorney General of Texas on behalf of the Texas Railroad

Commission and The State of Texas. Those arguments are respectfully incorporated herein and made a part hereof as though fully restated.

B. **The FERC Lacks Legal Competence to Make New Texas Law, and Its Failure to Abstain or Defer to Appropriate Texas Tribunals was Reversible Error.**

Arguments in support of Petitioners' allegations in this regard have been set forth in paragraphs B, C, and D of the "Argument" section of the Petition for Writ of Certiorari filed by the Attorney General of Texas on behalf of the Texas Railroad Commission and The State of Texas. Those Arguments are respectfully incorporated herein and made a part hereof as though fully restated.

C. **Opinion No. 239 Unlawfully Circumvented Sections 2(8), 103, and 503 of the NGPA by Retroactively Reopening and Vacating Ceiling Price Determinations Which Were Final and Binding.**

The FERC acknowledged that these Petitioners had applied for and received from the Railroad Commission affirmative determinations that their wells qualified as Section 103(c) wells under the NGPA, and that these determinations had become administratively final after review by the FERC. (30 FERC at 65,047). Nevertheless, Opinion No. 239 found that the Petitioners had violated Section 504(a)(1) of the NGPA by producing and selling the gas at Section 103 prices. Petitioners respectfully submit that Opinion No. 239 is nothing less than an impermissible, retroactive reopening and redetermination of final, binding Section 103 determinations. The opinion of the Tenth Circuit Court of Appeals upholding FERC Opinion No. 239 must be reversed.

By statute, a reopening can occur only pursuant to the specific procedures set forth in Section 503 of the NGPA, which procedures the FERC admittedly has not followed in this case. Moreover, unless and until the Section 103 determinations are reopened and vacated in accordance with Section 503, the FERC has no NGA jurisdiction over Petitioners' Section 103 wells. Furthermore, even if the procedures of

Section 503 are employed by the FERC, it is the state, and not the FERC, that has authority under Section 2(8) of the NGPA to designate proration units, and it is the state, not the FERC, that must construe the scope of Petitioners' well determinations in the first instance. Finally, any redesignation of NGPA proration units or vacating of Petitioners' authority to collect Section 103 incentive prices must be made effective prospectively, not retroactively.

1. **Section 503 Provides the Only Procedure for Reopening a Final and Binding Well Determination.**

Section 503 of the NGPA establishes the exclusive procedure for making well determinations under the NGPA. Section 503(a) provides that the "state agency" (in this case the Railroad Commission) is authorized to make "final" determinations for the purpose of "applying the definition of new, onshore production well under §103(c)." NGPA §503(a)(1)(c), 15 U.S.C. §3413(a)(1)(c). These determinations are then subject to **limited** review by FERC, as set forth in Section 503(b):

> AUTHORITY TO REVIEW AND REVERSE.
>
> The Commission shall reverse any final State or Federal agency determination . . . if —
>
> (A) it makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made; and
>
> (B) such preliminary finding and notice there of . . . is made within 45 days after the date on which the Commission received notice of such determination . . . and the final such finding is made within 120 days after the date of the preliminary finding.

NGPA §503(b)(1), 15 U.S.C. §3413(b)(1). The FERC alternatively has the option of remanding to the appropriate agency if it finds that the state determination was not consistent with the information contained in the public records of FERC and which was not part of the state agency record. See NGPA

§503(b)(2), 15 U.S.C. §3413(b)(2).

Section 503(d) provides that once the limited period during which FERC may review such a final state determination is past, the determination is "**binding with respect to such natural gas.**" (Emphasis added.) The determination may be reopened only if "in making such determination the commission or such . . . State agency relied on any untrue statement of a material fact . . . or there was omitted a statement of material fact necessary to make the statements made not misleading. . . . " 15 U.S.C. §3413(d).

The Section 103 determinations granted to these Petitioners duly became final and binding pursuant to Section 503, as the FERC acknowledged. (33 FERC at 61,422). Moreover, neither the Railroad Commission nor the FERC has moved to reopen these final and binding determinations under Section 503(d). The Show Cause order did not make any allegation that the Section 103 determinations were based on statements or omissions of a material fact, and Opinion No. 239 did not seek to reopen the well determinations pursuant to the provisions of Section 503(d).[1]

In short, the Petitioners' well determinations were final and binding, and the exclusive procedure for reopening them under Section 503 was not followed in this case. Thus, Petitioners cannot be found to be guilty of NGPA overcharges in charging and collecting NGPA Section 103 incentive rates.

2. **Unless and Until the Petitioners' Well Determinations are Reopened and Vacated, the FERC's NGA Jurisdiction is Removed Pursuant to Section 601 of the NGPA.**

Section 601(a)(1)(B)(iii) of the NGPA provides in pertinent part,

> . . . [F]or purposes of Section 1(b) of the Natural Gas Act, the provision of such Act and the jurisdiction

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[1]Opinion No. 239 addressed the possibility that material facts had been omitted from some well applications filed by the Petitioners, but dismissed this possibility (30 FERC at 65,047), concluding that "neither the Railroad Commission nor this Commission has acted to reopen respondents' Section 103 determinations." (**Id., see also** 33 FERC at 61,422).

> of the Commission under such Act shall not apply . . . [to] natural gas which is committed or dedicated to interstate commerce as of November 8, 1978, which is — . . . natural gas produced from any new, onshore production well (as defined in Section 103(c) of this act). . . .

15 U.S.C. §3431 (a)(1)(B)(iii). Thus, even if the Petitioners' Section 103 wells have produced some committed or dedicated gas, these wells were exempted from the Natural Gas Act and FERC jurisdiction thereunder pursuant to Section 601 of the NGPA. This concept was underscored in **Pennzoil Co. v. FERC**, 645 F.2d 360, 380 (5th Cir. 1981), **cert. denied**, 454 U.S. 1142 (1982):

> **Section 601(a)(1)(b) removes from continuing NGA jurisdiction** sales of certain gas that nevertheless was committed or dedicated to interstate commerce on or before November 8, 1978, with removal effective December 1, 1978. In short, this section **reduces the amount of gas subject to the NGA.** (Emphasis added.)

Thus, unless and until the Petitioners' final and binding Section 103 well category determinations are reopened and vacated, NGA jurisdiction is removed as to those wells, and there can be no NGA violation with respect to them.

3. Opinion No. 239 Unlawfully Circumvents the Exclusive Procedures of Section 503.

The FERC acknowledged below that it was not proceeding under Section 503, but contended that its enforcement power under Section 501 authorized it to "confirm the limitations" on Petitioners' Section 103 determinations. (33 FERC at 61,422). Petitioners respectfully submit that Opinion No. 239 is nothing less than an unlawful attempt to circumvent the exclusive procedures of Section 503.

Section 103 of the NGPA defines a new onshore production well as follows:

> [A]ny well . . . —
>
> (1) the surface drilling of which began on or after February 19, 1977;

(2) which satisfies applicable Federal or State well-spacing requirements, if any; and

(3) which is not within a **proration unit** —

(A) which was in existence at the time the surface drilling of such well began;

(B) which was applicable to the reservoir from which such natural gas is produced; and

(C) which applied to a well (i) which produced natural gas in commercial quantities or (ii) the surface drilling of which was begun before February 19, 1977, and which was thereafter capable of producing natural gas in commercial quantities.

NGPA §103(c), 15 U.S.C. §3313(c) (emphasis added).

Section 2(8) of the NGPA defined "proration unit" in pertinent part to mean:

(A) any portion of a reservoir, as **designated by the State** or Federal agency **having regulatory jurisdiction** with respect to production from such reservoir, which will be effectively and efficiently drained by a single well;

(B) any drilling unit, production unit, or comparable arrangement, **designated** or **recognized by the State** or Federal agency **having jurisdiction with respect** to **production** from the reservoir, to describe that portion of such reservoir which will be effectively and efficiently drained by a single well. . . .

NGPA §2(8), 15 U.S.C. §3301(8) (emphasis added). Accordingly, the key test for a Section 103(c) well is that it not be drilled in an existing proration unit.

In every instance where a Petitioner sought a Section 103 pricing determination, the Railroad Commission found that the application had been "properly filed with complete data to prove that the subject well described therein fulfills the requirements of this section [§103] of the Act," and that "such wells were not within proration units in existence at the time surface drilling of the respective wells began which are applicable to the reservoir from which the natural gas from the subject wells was produced. . . ." (R. 11237-38).

Although the FERC had affirmed the Railroad Commission's determinations, Opinion No. 239 found that the Section 103 wells were, after all, within existing proration units to some extent. The FERC ruled, in effect, that where an oil well and a gas well are drilled on overlapping acreage, the proration unit applicable to the oil well and the proration unit applicable to the gas well may be mutually exclusive. (30 FERC at 65,048). Under the new "gas-oil contact" standard announced in Opinion No. 239, any gas produced from an oil well above the "gas-oil contact" point is produced from an existing gas well proration unit, and does not qualify for Section 103 pricing "unless the [Railroad] Commission makes a finding that the later well is necessary to effectively and efficiently drain the portion of the reservoir covered by the pre-existing proration unit" — a finding allegedly not made in this case. (32 FERC at 61,136).

The fact is that the Petitioners received final and binding well determinations based on the statutorily required findings of Section 103. For the FERC to rule in Opinion No. 239, and for the Tenth Circuit Court of Appeals to affirm, that these same wells were completed within an existing proration unit directly contradicts the prior determinations. Consequently, Opinion No. 239 constitutes an improper collateral attack on the Section 103 determinations and must be reversed.

4. **The FERC Was Required Under the NGPA to Defer to the State Jurisdictional Agency to Interpret and Apply Its Own Policies Regarding Well Spacing and Proration Units.**

Even if Opinion No. 239 is deemed to be a "clarification" of previously issued Section 103 determinations, any such "clarification" must proceed pursuant to the exclusive procedures of NGPA Section 503, and must be provided in the first instance by the state agency, not the FERC.

Under the Section 503 determination process, the state agency is charged with determining whether the natural gas in question satisfies the required factual criteria to be

classified as gas entitled to an NGPA incentive price.[2] It also makes subsidiary factual determinations, including whether the gas satisfies each and every eligibility criterion.[3] In short, the state agency acts like a trial court. The FERC's role in this process is not to decide factual issues. Instead, it functions like an appellate court and reviews the state agency's decision based upon a substantial evidence standard. **See L&B Oil Co. v. FERC**, 665 F.2d 758, 762 (5th Cir. 1982).[4]

This division of authority was not arrived at by chance. On the contrary, it was adopted by Congress in the recognition that the state agencies had far more expertise than the FERC to apply the NGPA Section 103 and other incentive pricing category standards. These standards relate specifically to state oil and gas regulatory rules and concepts, and for Section 103 gas include, **inter alia**, whether a well complies with state spacing rules, what constitutes an NGPA proration unit under state law, and whether a well is the first in a state law NGPA proration unit.[5] Consequently, the state, not the FERC, should clarify the scope of Petitioners' Section

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[2]**See** Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 116, **reprinted in** I FERC paragraph 3101 at 3125 (1978) ("Conference Report").

[3]**Id.; see also** testimony of Staff-sponsored witness and former Commission General Counsel Robert R. Nordhaus. (R. 3760-74).

[4]The NGPA Conferees explicitely stated:

> . . . [T]here is no intention to allow the Commission to "second-guess" the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission.

Conference Report, **supra** note 2, at 3, I FERC at 3126. Because the review standard is the substantial evidence standard and is identical for both the court and the FERC, the statute minimizes the degree of deference that courts must pay to FERC's intervening decision. **L&B Oil Co. v. FERC, supra**, 665 F.2d at 762.

[5]**See** NGPA Sections 2(8) and 103(c), 15 U.S.C. §§3301(8), 3313(c). The FERC's regulations implementing NGPA Section 103 likewise confirm that state law concerning NGPA proration units applies. **See** 18 C.F.R. §271.305(a)(iii)(B)(2) ("**State law proration unit means a proration unit, drilling unit or similar unit expressly designated in accordance with State law** or Federal law [for federally controlled properties such as the Outer Continental Shelf] (other than the NGPA)." (Emphasis added.)).

103 determinations and NGPA proration units in the first instance.

5. The FERC Should Not Have Imposed Upon the Petitioners a Retroactive Penalty.

The Enforcement Staff emphasized that this case represents only the "tip of the iceberg" and presents the Commission with the opportunity to reverse Texas policy of allowing oil well operators throughout the Panhandle Field to produce casinghead gas based on ten-acre proration units. [30 FERC at 65,033 (R. 20912); 33 FERC at 61,428 n. 36 (R. 22910-11)]. These Petitioners respectfully submit that if the FERC wishes to adopt new policy or law with respect to such matters, it cannot do so by retroactively imposing penalties on well operators who received the relied-upon affirmative state and federal well determinations.[6]

There is an "almost conclusive presumption against power to take retroactive action unless Congress plainly specifies such power." **Transcontinental & Western Air, Inc. v. CAB**, 169 F.2d 893, 894 (D.C. Cir. 1948), **aff'd**, 336 U.S. 601 (1949); **Union Pacific R.R. v. Laramie Stock Yards Co.**, 231 U.S. 190, 199 (1913). Because action having retroactive effect is highly suspect, courts reviewing such action have "no overriding obligation of deference to the agency decision." **Retail, Wholesale and Department Store v. NLRB**, 466 F.2d 380, 390 (D.C. Cir. 1972). Any retroactive application of standards is not favored, even if without monetary consequences. The judicial "hackles bristle still more when a **financial penalty** is assessed **for action that might well have been avoided** if the agency's changed disposition had been earlier made known **or might even have been taken in express reliance** on the standard previously established." **NLRB v. Majestic Weaving Co.**, 355 F.2d 854, 860 (2d Cir. 1966) (emphasis added).

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[6]The FERC's own regulations implementing Section 503(d) state that if a well determination is reopened and vacated, the right to collect the previously authorized maximum lawful price "shall terminate on the date of the order vacating the determination." 18 C.F.R. §275.205(d).

The overriding purpose of the NGPA is to provide additional incentives for the development and production of natural gas to overcome the effects of more than twenty years of regulation which had proven to be dangerously counterproductive. To impose refunds on producers holding final, valid Section 103 determinations will irrevocably breach the principle of finality of well pricing determinations and impede well drilling, to the detriment of the statutory purposes.[7]

D. **The Proceeding Below Violated Elementary Principles of Due Process Because Petitioners Were Given Inadequate Notice of the Claims Against Them and No Opportunity to Present Evidence Contesting Those Claims.**

The theory on which the FERC found that the show cause respondents had violated the NGA and the NGPA was not disclosed in either the Show Cause Order or the Staff's direct case. Rather, it was revealed for the first time in Staff's rebuttal testimony. As a result, these Petitioners did not have adequate notice of the allegations against them and were given no opportunity to present evidence disproving those allegations. Particularly in a Show Cause proceeding, where violations of law are involved and the burden of proof is on the Staff, such procedural irregularities are unacceptable.

The Show Cause Order and Staff's opening evidence was premised on the existence of two separate and identifiable producing formations in the West Panhandle Field. The brown dolomite formation was alleged to be a "dry gas" zone. "Dry gas" was defined as gas from a formation "that does not produce oil." (R. 16939-40). "Casinghead gas," on the other hand, was defined as gas indigenous to an "oil stratum" and produced from the stratum with oil. (R. 16940). Petitioners' production of gas from the brown dolomite was said to be illegal because the brown dolomite was a non-oil

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[7]**Cf. McDonald v. Watt,** 653 F.2d 1035, 1046 (5th Cir. 1981) (reversing agency decision to give retroactive effect to decisions relating to qualifications for federal leases; "the effect of retroactivity is to cloud title to hundreds of issued leases").

bearing formation that produced only "dry gas." (R. 16940-42).

In response to these allegations, Petitioners devoted their testimony and evidence to proving that the brown dolomite produces oil and is not, therefore, a "dry gas" stratum. (See e.g., R. 6358-89, 6540-47, 6701-67, 7840-67, 11300-77, 11720-852, 11080-118). Petitioners and supporting intervenors sponsored the testimony of 34 witnesses, most of whom testified that, based on first-hand or expert knowledge, the brown dolomite produces oil. Moreover, Petitioners sought to prove that their wells had been classified as oil wells by the Railroad Commission.

In their rebuttal case, Staff's witnesses conceded for the first time that there is oil in the brown dolomite and that the brown dolomite is not productive of dry gas only. However, Staff presented the prepared rebuttal testimony of a former employee of the Railroad Commission, Mr. Bob R. Harris (R. 15120-64), to present a new theory of the case allegedly based upon state law applicable to the Panhandle Oil and Gas Fields. As summarized by Staff attorneys, this rebuttal testimony now theorized: (1) that the "Railroad Commission established a vertical division within the common reservoir between a portion of the reservoir which was to be produced by oil wells and a portion of the reservoir which was to be produced by gas wells"; (2) it did so by adopting a rule in 1933, "which requires that the operator of an oil well determine the position of the gas [oil] contact in each individual well bore and that all perforations be made below the gas/oil contact . . ."; and (3) that the "Railroad Commission deliberately set out to make two separate fields within the so-called "common reservoir" to allow gas well production [only] from the gas cap [above] and oil production [only] from the oil column [below]." (R. 3363-64). In essence, Staff for the first time argued that the brown dolomite should be subdivided into an oil-bearing portion and a non-oil bearing portion for purposes of determining whether the Show Cause Order should be upheld.

There is no reference in the Show Cause Order to a "gas-oil contact" within the brown dolomite formation, or to oil

and gas proration units based on a gas-oil contact, or to a horizontal division of the Panhandle Oil and Gas Fields based on the "gas cap," or to any of the other elements of Staff's new theory of the case. Since these concepts were not defined in the Show Cause Order, no guidance was given to any of the parties as to sources in federal or state law that would form the basis for a complaint utilizing such concepts. Nor was there any reference to these concepts in Staff's direct case or its responses to interrogatories and data requests. None of these Petitioners had notice of Staff's new theory of the case until Staff filed its rebuttal case. By that time, under the "expedited" procedures ordered by the FERC, the time for presentation of affirmative evidence by Petitioners and their supporters had passed.[8] Yet this is the theory of the case that the FERC adopted in Opinion No. 239. (30 FERC at 65,047-48).

These Petitioners respectfully submit that finding them in violation of the NGA and NGPA based on the new theory spelled out in the rebuttal case was clear error. The Commission has a "duty at some stage prior to the close of proof to declare what it considered the relevant standards to be." **Hill v FPC**, 335 F.2d 355, 358 (5th Cir. 1964). In this case, the FERC declared the relevant standards in the Show Cause Order and in its direct case. By revising those standards after the time had passed for Petitioners to submit affirmative evidence, the FERC committed serious procedural error, amounting to a denial of due process in the constitutional sense. As a result of this error, Staff was able to present a rebuttal witness whose unanswered testimony constituted the principal, if not exclusive, evidentiary basis for the FERC's findings regarding the "gas-oil contact," an issue that was critical to the finding that Petitioners had violated NGA Section 7(b) and NGPA Section 504. (**See** R. 15120-64, 30 FERC at 65,047-48).

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[8]The Petitioners attempted to submit affirmative evidence responding to the Staff's rebuttal theory by subpoenaing additional witnesses and presenting into evidence depositions of Railroad Commission personnel and former personnel. All efforts to present evidence responding to the "gas-oil" contact theory were opposed by Staff and denied by the Presiding Judge.

The "substantial evidence" standard of the NGA means that parties must have the opportunity not only to criticize evidence introduced by others, but also **"to introduce adverse evidence." Mobil Oil Corp. v. FPC,** 483 F.2d 1238, 1258 (D.C. Cir. 1973) (emphasis added). As stated in **Hatch v. FERC,** 654 F.2d 825, 835 (D.C. Cir. 1981), "[c]ourts have uniformly held" that when an agency changes a prevailing standard in an adjudicatory setting, "the party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standards." The court further emphasized that:

> Supreme Court cases suggest that such notice and opportunity to meet the new standard is a constitutional imperative of due process as well [citations omitted] . . . [W]hen, as here, the change is a qualitative one in the nature of the burden of proof **so that additional facts of a different kind may now be relevant for the first time,** litigants must have an opportunity to submit conforming proof.

Id. (emphasis added). The FERC's refusal to allow Petitioners to answer Staff's new theory therefore cannot be countenanced.

CONCLUSION

Review by this Honorable Court is necessary to correct the erroneous decision of the Tenth Circuit Court of Appeals upholding FERC Opinion No. 239. Section 1(b) of the NGA reserves to the states the power and authority to regulate "production and gathering" of oil and gas. In Opinion No. 239, the FERC erroneously circumvented Sections 2(8), 103, and 503(d) of the NGPA by retroactively withdrawing and changing final and binding ceiling price determinations for gas produced by these Petitioners. The FERC acted beyond its competence and abused its discretion by refusing to defer to the Texas Railroad Commission and Texas courts in deciding new or unsettled issues of Texas state law. Finally, the FERC violated basic procedural due process by giving these Petitioners inadequate notice of the nature of the alleged

state and federal law violations and by denying Petitioners an adequate opportunity to present evidence in their defense.

For each and all of the foregoing reasons, these Petitioners urge this Court to grant this petition, to reverse the decision of the Tenth Circuit Court of Appeals, and to remand this case to the FERC with instructions to vacate its Opinion No. 239 and to dismiss the show cause proceeding.

Respectfully submitted,

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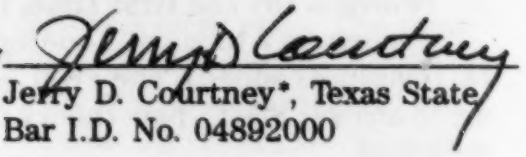
By 
Jerry D. Courtney*, Texas State
Bar I.D. No. 04892000

*Application for Admission to the
Bar of this Court pending

PROOF OF SERVICE

Proof of service, as required by Rule 28.5, accompanies this Petition for Writ of Certiorari.